

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MARK JOSWICK,)	
)	
Appellant,)	
)	
v.)	C.A. No. 05-06-447
)	
MICHAEL SHAHAN, Director of)	
DELAWARE DIVISION OF MOTOR)	
VEHICLES, DEPARTMENT OF)	
TRANSPORTATION)	
)	
Appellee.		

Submitted: March 10, 2006
Decided: June 5, 2006

Thomas A. Foley, Esquire
1326 King Street
Wilmington, DE 19801
Attorney for Appellant

State of Delaware
Department of Justice
Frederick H. Schranck, Esquire
Deputy Attorney General
P.O. Box 778
Dover, DE 19903
Attorney for Appellee

FINAL OPINION AND ORDER

On December 17, 2004 Mark Joswick (hereinafter “appellant”) was arrested for driving under the influence of alcohol in violation of 21 Del. C. § 4177(a). He requested a hearing to appeal the revocation of his driver’s license pursuant to 21 Del. C. §2742(f). An administrative hearing was held on May 3, 2005 before hearing officer Gerald Toner (hereinafter “hearing officer”). The hearing officer found probable cause for Police Officer Mark Miller (hereinafter “Officer Miller”), the arresting police officer, to believe that appellant was in violation of 21 Del. C. § 4177(a), and on May 12, 2005 the hearing

disposition was issued, ruling against appellant, defendant-below. Appellant's driver's license was suspended for a period of ninety days, and appellant filed a timely appeal in this Court on May 27, 2005 seeking reversal of the hearing disposition. Appellant later filed his opening brief on appeal, which was received by this Court on February 23, 2006. Appellee's Answering Brief was received by this Court on March 10, 2006.

FACTS

On the night of December 17, 2004 Officer Miller, a police officer with the City of Newark, was on routine uniform patrol in a marked patrol car. He was driving on East Main Street in Newark, Delaware traveling westbound towards the main portion of Main Street and heading into the town of Newark, coming off of Library Avenue. At approximately 10:47 p.m. he was driving on East Main Street and as he passed Newark Shopping Center, Officer Miller observed a black Volkswagen hatchback exit the shopping center without its headlights turned on. After passing the Volkswagen, Officer Miller pulled his patrol car over to the left hand parking lane of East Main Street just west of Farmer's Lane, a road connecting East Main Street to East Delaware Avenue, and turned around in his seat to ascertain where the Volkswagen had gone. Officer Miller watched as the Volkswagen pulled out of Newark Shopping Center, still without its headlights on, and, instead of turning right onto East Main Street, the vehicle cut across East Main Street and onto Farmer's Lane, still without illuminating its headlights. Officer Miller proceeded through the parking area in the fire lane of the Main Street Court Apartments, and came to a stop prior to reaching East Delaware Avenue. He observed the same black Volkswagen approach the stop sign at Farmer's and East Delaware Avenue. Its headlights were now on, and it was proceeding onto East Delaware Avenue.

He decided to drive behind the Volkswagen, turned onto East Delaware Avenue and observed it appeared as though two individuals were in the Volkswagen. As both cars traveled in the right lane of East Delaware Avenue heading eastbound, Officer Miller decided to initiate a traffic stop, and prior to engaging his overhead lights the Volkswagen came to a stop at a red light at the intersection of East Delaware and Library Avenue of Route 72. As the traffic light at this intersection changed to green Officer Miller engaged his overhead lights. The Volkswagen made a left hand turn onto Route 72 and then pulled into the right hand lane, and the Volkswagen finally pulled over into the post office parking lot and stopped in the entrance lane of the post office.

Officer Miller testified he observed appellant/driver moving around in the vehicle, and so for officer safety, Officer Miller made a passenger's side approach. He knocked on the window and identified himself and asked appellant if "he knew why he was being stopped." Appellant replied it was because his headlights were out when he was at Newark Shopping Center. Appellant provided Officer Miller his license, and while speaking with him, Officer Miller detected an odor of alcohol from the passenger. Officer Miller noted appellant's eyes were glassy, and upon handing Officer Miller his license, Officer Miller advised appellant that he was coming around to appellant's side of the vehicle. Upon approaching the driver's side, Officer Miller detected a moderate odor of alcohol on appellant's breath. At this point, Officer Miller requested appellant to step outside and away from the Volkswagen, and Officer Miller still detected a moderate odor of alcohol from appellant's person.

He asked appellant if he knew both his alphabet and if appellant could count backwards, and Officer Miller testified that he "also ascertained that he [appellant] had

some college education.” Appellant performed the alphabet test, E to W, and counted backwards from 101 to 87. Officer Miller testified appellant was correct on all of the letters in the alphabet test, but that appellant was “very slow” and “paused at the Letter Q,” but Officer Miller did not note this as a “fail.” When appellant counted backwards, Officer Miller described appellant as “slow and methodical he appeared to be concentrating heavily on it, but again it was also a pass.”

Next, Officer Miller performed a horizontal gaze nystagmus test, and testified as to his National Highway Traffic Safety Administration (hereinafter “NHTSA”) certification training. Officer Miller determined appellant had equal tracking of pupil size and that appellant was wearing soft contact lenses at the time of the test. Officer Miller noted a fail on four clues, specifically, appellants eyes showed lack of smooth pursuit; appellant had onset of nystagmus prior to 45 degrees in his right eye; appellant had onset of nystagmus at maximum deviation in his left eye.

Third, Officer Miller requested appellant perform the walk-and-turn test. Officer Miller noted appellant was wearing black sneakers and “appeared very comfortable in them.” He testified that he explained the test to appellant, and that it is his regular practice to provide such an explanation prior to administering the test. “I explain that it’s going to be a simple moving test, nine steps forward, turn, nine steps back, and I explain that I am going to demonstrate and give further instructions while they stand in a prescribed position.” Since they were in a parking lot, Officer Miller asked appellant to stand on one of the parking space lines, left foot on the line, right foot front heel-to-toe, while Officer Miller explained and demonstrated the test which was done. Appellant did not lose his balance, and did not begin performing the test while Officer Miller was

explaining the test to him. However, Officer Miller testified appellant stopped while walking at the turn during the actual test, and “for his turn he turned incorrectly, turning on the balls of his feet.” Further, on the third step of appellant’s returning nine steps Officer Miller observed appellant sway and use his arms to balance himself, and that he only took eight steps instead of the nine, as previously instructed by Officer Miller.

Fourth, Officer Miller administered the one-leg stand test, which he also demonstrated to appellant. Officer Miller advised appellant the test would last thirty seconds and during the last ten seconds of the test, he observed defendant sway to his right and raise his left arm for balance, and appellant also put his right foot down. Officer Miller noted this test, as well, as a fail. Fifth, Officer Miller administered the portable breathalyzer test (hereinafter “PBT”). Officer Miller noted appellant was “very hesitant” about taking a PBT. Officer Miller utilized a PBT from another police officer’s vehicle, who had arrived on the scene as well. Officer Miller tested the PBT to ensure it functioned correctly. The PBT read a positive, and at this point, approximately 11:12 p.m., he placed appellant under arrest and took him to the Newark Police Department for observation and further processing.

At the station, Officer Miller administered a breathalyzer test using Intoxilyzer 5000, #68-10248 after the requisite observation period, during which appellant displayed no unusual actions. The observation period began at 11:28 p.m. and ended at 11:57 p.m. Officer Miller testified to his certification and training to administer the test by the Delaware State Police Academy. Counsel for appellant stipulated to the machine’s most recent calibration which took place on November 18, 2004. Officer Miller testified, over

objection by counsel for appellants, that appellant's breath sample at 11:57 p.m. was .084, over the legal limit of .080 in the State of Delaware.

On cross-examination of Officer Miller, appellant's counsel re-affirmed appellant passed the alphabet and counting field tests. Upon questioning, Officer Miller testified, to the best of his recollection, that the horizontal gaze nystagmus tests were performed after he asked appellant to face away from the headlights and oncoming traffic, however Officer Miller was not completely certain of this fact. Furthermore, appellant's counsel inquired into why appellant failed the walk-and-turn test:

- "Q: Okay, so in the walk-and-turn test, the first nine steps he does; correct?
A: Correct.
Q: He doesn't do anything on it?
A: Correct.
Q: And then he was to turn, the prism is when he turned on the balls of his feet instead of the toes or the heels?
A: When I explained the turn, I explain the left foot will remain where it is, and you take a series of small steps around it, baby steps like in basketball when you pivot on one foot. From what I noted, the balls of the feet, he simply pivoted on both feet.
Q: Did more like a military turn?
A: Almost like a ballerina's pirouette.
Q: Okay, but he didn't fall or stumble when he did that?
A: No.
Q: Okay, so when he prised, you wanted him to do little baby steps instead of a wheel turn, I guess (inaudible)
A: Correct.
Q: Okay, and you had demonstrated that for him?
A: Yes, I had.
Q: All right, that was presumably, though, the first time he has ever seen that?
A: I assume so."

Finally, appellant's counsel re-affirmed Officer Miller's testimony regarding appellant's performance on the one-leg-stand, specifically that appellant put his foot down on count 25, that appellant swayed to the right, using his left arm to balance him. As noted above, on May 12, 2005 the hearing disposition was issued, finding that

probable cause existed for the arrest, ruling against appellant, defendant-below pursuant to 21 Del. C. § 2742(c). Appellant's driver's license was suspended for a period of ninety days, and appellant filed a timely appeal in this Court on May 27, 2005 seeking reversal of the hearing disposition.

STANDARD OF REVIEW

In appeals from an administrative hearing of the Department of Motor Vehicles, this Court has the limited authority to correct any errors of law and to determine whether the record below contains substantial evidence to support the hearing officer's factual findings and legal conclusions. *Howard v. Voshell*, 621 A.2d 804, 806 (Del.Super.1992) citing *Olney v. Cooch*, 425 A.2d 610, 613 (Del.Super.1986). The decision of the DMV administrative officer will stand unless the Court finds the hearing officer's findings are not supported by substantial evidence of record or are "not the product of an orderly and logical deductive process." *Id.* citing *Quaker Hill Place v. State Human Relations*, 498 A.2d 175 (Del.Super.1985).

ANALYSIS

A police stop may be initiated in Delaware of any person "abroad or in a public place who the officer has reasonable ground to suspect is committing, has committed, or is about to commit a crime, and may demand the person's name, address, business abroad, and destination." 11 Del. C. § 1902(a). Probable cause is measured by the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1983). A police officer has probable cause to believe that a defendant has violated 21 Del. C. § 4177 when "the officer possesses information which would warrant a reasonable man in believing that such a crime has been committed" and further, "To establish probable cause, the police

are only required to present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability that the defendant has committed a crime.” *State v. Maxwell*, 624 A.2d 926, 930 (Del.Supr.1993). Appellant correctly states that Officer Miller first needed reasonable articulable suspicion to justify his decision to stop appellant’s vehicle. *United States v. Arvizu*, 634 U.S. 266, 273 (2002). Appellant correctly notes once a person is detained the Fourth Amendment requires that the police have reasonable articulable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, at 21; *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989).

When Officer Miller observed appellant operate his motor vehicle, at nighttime, without headlights turned on, and then proceed to exit Newark Shopping Center, drive across East Main Street and enter Farmer’s Lane, still without headlights on, appellant violated 21 Del. C. § 4331 requiring compliance of operators of motor vehicles to switch on such lights after sunset. Once stopped, Officer Miller noted a moderate odor of alcohol from appellant’s breath and person and additionally he observed appellant’s glassy eyes. Furthermore, as noted on the administrative officer’s Hearing Disposition and not refuted at the administrative hearing, appellant admitted he failed to turn his headlights on upon exiting Newark Shopping Center.

CONCLUSION AND ORDER

Based on this Court’s review of the record, the administrative hearing officer committed no error of law, as substantial evidence exists in the record to support the hearing officer’s factual findings and legal conclusion that the reasonable articulable suspicion prior to and during the stop, based on the totality of the circumstances,

amounted to probable cause in that there was a fair probability appellant committed the crime for which he was charged. For these reasons, this Court AFFIRMS the decision below.

IT IS SO ORDERED this 5th day of June, 2006.

Joseph F. Flickinger III
Judge

cc: CCP, Civil Division